IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WESLEY CROSS,

Appellee-Plaintiff below,

v. **Docket No. 34147**

MARK E. SMITH,

Appellant-Defendant below.

BRIEF ON BEHALF OF APPELLEE WESLEY CROSS

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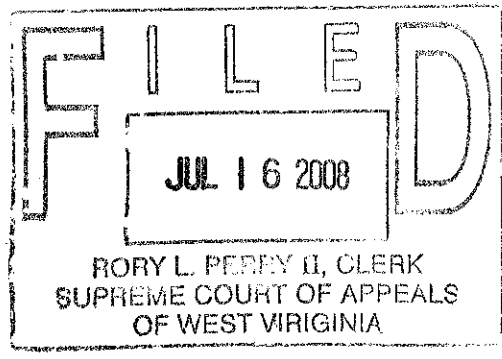

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KIND OF PROCEEDING AND NATURE OF CIRCUIT COURT'S RULING

This action was filed in the Circuit Court of Brooke County, West Virginia, as a result of a motor vehicle wreck which occurred on August 10, 2004, in Wellsburg, West Virginia. The case proceeded to trial and the jury returned a verdict finding for the defendant-appellant, Mark E. Smith. Plaintiff-appellee filed a motion for a new trial on the grounds that the verdict was contrary to the law and undisputed and uncontradicted evidence that the defendant-appellant was guilty of negligence by failing to look effectively prior to making a left turn on a public highway and striking the plaintiff-appellee with his vehicle. The Circuit Court granted plaintiff's-appellee's Motion for a New Trial finding that defendant-appellant was, in fact, negligent as a matter of law by making a left turn on a highway without looking effectively. Defendant-appellant appeals said decision by contending that a motor vehicle operator on an open public highway has no duty to look effectively prior to making a left turn.

STATEMENT OF THE CASE

On August 10, 2004, appellee-plaintiff Wesley Cross was riding as an innocent passenger in a vehicle, being driven by James Yost, traveling west on Washington Pike, near Wellsburg, West Virginia. At a point on a straight, open segment of the highway, the Yost vehicle approached the defendant Smith's vehicle from behind and began an attempt to pass the appellant-defendant's vehicle within the speed limit of 45 mph and in a lawful passing zone. The Yost vehicle passed the appellee's vehicle at a point when the appellee testified that his maximum speed on the highway was 25 miles per hour, nearly one-half the speed limit of 45 mph. [See Tr. at P. 423, L. 1-3]. Suddenly, and without warning or signal, the appellant-defendant made a left turn across the center line of the highway into the Yost vehicle striking it directly in its passenger side where the appellee-plaintiff

was seated. This impact caused the passing Yost vehicle to go out of control, off the highway, through and over a 4-foot wide ditch, into a residential yard, around a telephone pole and back onto another roadway. As a proximate result thereof, appellee-plaintiff Cross suffered personal injuries including a head injury, jaw injury, neck injury and a low back disc herniation with need for surgery.

The following facts were undisputed and uncontested at trial and are important to the issue of liability and the circuit court's decision:

(1) The segment of highway upon which the appellant-defendant was being passed by the Yost vehicle was a straight stretch for hundreds of yards; [See Tr. at P. 252, L. 6-9]

(2) There was no reason nor explanation provided at trial as to why the appellee-defendant should not have seen the vehicle in which the appellee-plaintiff was riding as an innocent passenger prior to turning into it. In fact, the appellant-defendant himself testified that he did not know why he did not see this vehicle prior to turning into it. [See Tr. at P. 251, L. 9-19]

(3) Based upon statements from persons at the scene, the investigating police officer, West Virginia State Trooper Corporal Gibson noted in the wreck report that a contributing circumstance to the wreck was the failure of the appellant-defendant Smith to signal, or give a proper signal; [See Tr. at P. 419, L. 20-24] The appellant-defendant admitted to the same on cross-examination [See Tr. at P. 260, L 1]

(4) The appellant-defendant admitted at trial that he had a clear view for hundreds of yards behind him in order to decide whether to turn left across the center line and into the vehicle in which the plaintiff was riding as a non-negligent passenger; [See Tr. at P. 252, L. 6-9]

(5) The appellant-defendant told the investigating officer at the scene, and the investigating officer State trooper Corporal Gibson noted in his police report, as follows:

> "I was driving on Washington Pike, westbound. I had slowed down to make a left turn. I looked ahead of me and behind me in my mirror and it looked clear. I started to turn. **I forgot my signal and turned into a car** as it passed my vehicle in a no passing zone".

Emphasis added [See Tr. at P. 253, L. 17-22]

(6) With regard to whether he had his turn signal on prior to turning into t he Yost vehicle, at trial the appellant-defendant admitted on the stand that "I might have told [the officer], that I do not recall." [See Tr. at P. 436, L-7]

(7) When asked at trial whether he also told appellee-plaintiff and Yost, the operator of the vehicle he struck, that he never had his turn signal on prior to turning left into said vehicle, appellant-defendant admitted that he told them that he "did not know for sure" whether he had his turn signal on. [See Tr. at P. 257, L 13-16.]

(8) At the trial, appellant-defendant admitted that it was important for him to have had his turn signal on prior to turning left across the center line into another lane. [See Tr. at P. 252, L. 13-17]

ASSIGNMENTS OF ERROR

Appellee-plaintiff contends that the Circuit Court did not err by setting aside the jury's verdict because it was clear, by law and by the undisputed and uncontested facts above, that the defendant was negligent.

STANDARD OF REVIEW

It is well-established that "[a] trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion." Stillwell v. City of Wheeling, 210 W. Va. 599, 604, 558 S.E.2d 598, 603 (2002); see also syl. pt. 2, State v. Vance, 207 W. Va. 640, 535 SE2d 484 (2000).

Elaborating on this point, this Court held in Stillwell, 210 W. Va. at 604,558 S.E.2d at 603, that:

> When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion.

DISCUSSION OF LAW AND ARGUMENT

W. Va. Code § 17C-8-8, entitled "Turning movements and required signals; penalty," states, in pertinent part, as follows:

> **(a) No person shall** turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in sections two, three, four or five of this article, or turn a vehicle to enter a private road or driveway or otherwise **turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety. No person shall so turn any vehicle without giving an appropriate signal in the manner hereinafter provided in the event any other traffic may be affected by such movement.**
>
> (b) A signal of intention to turn right or left when required **shall be given** continuously during not less than the last one hundred feet traveled by the vehicle before turning.

(emphasis added)

In the instant case, the trial judge did not abuse his discretion in finding as a matter of law that the appellant-defendant was negligent in failing to look effectively and to see a vehicle in the left lane next to him side by side in the middle of a two-lane highway before he made a left turn into that vehicle. There was/is no genuine issue of fact as to the negligent driving of the appellant-defendant – he improperly made a left turn on an open country highway, without giving a proper turn signal and without looking effectively on a straight stretch of highway in which he had a clear view behind him for hundreds of yards and turned left into a passing vehicle. The trial court should have granted the appellee-plaintiff's motion for judgment as a matter of law at the close of the appellant-defendant's case and the only issue that should have gone to the jury was appellee-plaintiff's damages. The appellee-plaintiff Cross was not guilty of the negligence as he was an innocent passenger in another vehicle. The only issue in this case was/is the negligence of the appellant-defendant in making a left turn into a passing motor vehicle.

The appellee-plaintiff moved the trial court, prior to submitting the case to the jury, that the defendant should be found guilty of negligence as a matter of law and that issue removed from the jury's consideration. The court denied said motion at that time and submitted the case to the jury. Following the jury's finding that the appellant-defendant was not guilty of any negligence, the trial court set aside the verdict and found that "the Defendant was guilty of negligence as a matter of law by turning left without looking effectively to see the passing vehicle in which the plaintiff was riding as a non-negligent innocent passenger." The trial court noted that its finding was based upon trial testimony, including that of the appellant-defendant Smith himself when he testified at trial as to why he did not see the Yost vehicle prior to impact: **"I have no idea. I mean, I didn't see it, that's all I know."** [See Order Granting Plaintiff's Motion for New Trial entered December 5, 2007]

In further explanation of its ruling, the trial court stated at the September 21,2007, hearing on Plaintiffs Motion for a New Trial as follows:

> THE COURT: Okay. I am quite concerned on the looking effectively part of the case. You know, my recollection of the testimony concerning the looking is pretty much what Mr. Cuomo put in his memorandum. That your client said that he looked in his mirror, he didn't see him, and he had no explanation. So I'm concerned that there is no evidence in the case from which the jury could determine whether he looked effectively or not.
>
> . . . .
>
> THE COURT: They very clearly made it. I am concerned about the lack of evidence as to the looking effectively. If he looked, why didn't he see it. You know, he has the obligation to look. He has the obligation not to make the turn until it can be safely made. But, of course, if he doesn't see the vehicle the he - - it has fulfilled the totality of it. I don't think there's any more argument. I think what I'm going to do, I'm going to grant the motion for a new trail on that ground and that ground alone. That is, I think that the jury would have to speculate as to whether he looked effectively because the only evidence in the case about the looking is that he looked in his mirror, he didn't - - he said he turn around and looked and that he didn't see it. And he had no explanation as to why he didn't see it. . . .

[See Transcript of September 21,2007 hearing at pgs. 5-6 and 9-10]

In Adkins v. Minton, 151 W Va. 229,151 S.E.2d 295 (1966), this Court held in syllabus Point 5 that:

> [i]f the driver of a forward vehicle making a left turn into a passing lane saw an overtaking vehicle attempting to pass before making the turn and still turned into the left, or passing, lane, and an accident resulted, such driver of the forward or turning vehicle would be guilty of negligence as a matter of law; or ***if such driver of a forward vehicle looked to the rear when an overtaking vehicle was attempting to pass and did not see the overtaking vehicle, such driver of the overtaken vehicle did not look effectively, which is a requisite in such cases, and would still be guilty of negligence as a matter of law.***

(emphasis added)

In syllabus point one of Addair v. Bryant, 168 W.Va. 306, 284 S.E.2d 374 (1981), this Court held as follows:

> ***The making of a left turn into a passing lane or across oncoming traffic is one of the most dangerous movements a vehicle can make on the highway***, and the driver of a vehicle making such movement ***must ascertain if it can be done with reasonable safety.***

(emphasis added)

Appellant relies on this Court's decision in Howard's Mobile Homes, Inc. v. Patton, 156 W. Va. 543, 195 S.E.2d 156 (1973), as an "elaboration" upon Adkins. In Howard, this Court stated that there was a conflict as to the position of Mrs. Fitzsimmons vehicle when the defendant began to pass. The Howard Court asked such questions as: Was he in the process of passing her when she began to turn left? Was the straight stretch of road not very long. In the case at bar, such questions are all answered.

In the instant case, there was/is no question as to the position of the vehicles when the Yost vehicle began to pass the Smith vehicle. Both vehicles were parallel and, eventually, side-by-side at the center line of a long, straight-stretch of road. In this instant case, the Yost vehicle was in the process of passing the front of the Smith vehicle when the Smith vehicle began to turn left. In the instant case, the passing zone area was hundreds of yards long and it was straight, with no obstructions. Furthermore, the following facts make the Howard decision in applicable:

(a) In Howard, the forward vehicle driver testified that she gave a signal for a left turn for 150 to 200 feet. In the instant Cross case, the appellant-defendant Smith never testified to any facts showing that he was in compliance with the statute that required his turn signal to be on for 100 feet prior to making his turn;

(b) In Howard, there was a conflict as to the position of her car when the defendant began to pass. Was he in the process of passing her when she began to turn left? In the instant Cross case, there was/is no conflict to the fact that the passing Yost vehicle was passing the appellant-defendant Smith when said appellant began to make his left turn and was side-by-side with appellant on a straight, open country highway, when appellant began to make his left turn into the side of the Yost vehicle. There was/is no reason given as to why appellant did not see the Yost vehicle;

(c) In the Howard case, the straight stretch of road was only a few hundred ***feet*** long. In the instant Cross case, the appellant-defendant himself testified that the passing straight stretch behind him, to the point where the passing zone began, was hundreds of ***yards*** long;

(d) In the Howard case, there was no immediate passing zone preceding the impact. In the instant Cross case, there ***was*** a passing zone immediately preceding the place where the appellant-defendant turned left across an open country highway and into the vehicle of the plaintiff Yost;

(e) In the Howard case, the speed of the passing vehicle was not known when he rounded a curve and approached Fitzsimmons' vehicle. In the instant Cross case, the uncontradicted testimony was that the Yost vehicle was "within the limit" at the time of impact.

(f) In the Howard, there was no question that there was a curve immediately before the forward vehicle was attempted to be passed. In the instant Cross case, there was no such curve – it was a straight stretch country highway with a passing zone immediately preceding the impact for hundreds of yards.

Without question, appellate Smith was negligent as a matter of law and it was agreed that appellee-Cross was a non-negligent party. The trial court correctly found, and did not abuse its discretion in finding, that there was no question of fact created for the jury as far as the appellant-defendant's Smith's "failure to look effectively," and therefore, appellant-defendant Smith was properly determined by the trial court to have been guilty of negligence as a matter of law. Obviously, had appellant-defendant looked effectively he would have seen the Yost vehicle.

The principles of law in Adkins ***do*** apply to the instant case. There are no real distinguishing material factors different in the instant case that would call for deviating from the Adkins decision. The instant case involved a straight highway with over 100 yards of passing zone and the clear ability of the appellant-defendant to be in a position to see any passing vehicle directly parallel and adjacent to him before making his left turn into the passing lane and any passing vehicle.

CONCLUSION

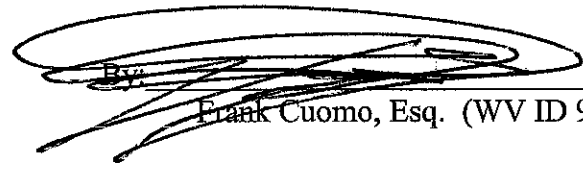
The cases cited by the appellant-defendant inapplicable to the facts of the instant case. The negligence of driving non-party Yost was/is irrelevant as he, Yost, was not making a claim against appellant-Smith in this case. The only liability issue in this trial was the negligence of the appellant-defendant Smith. Whether appellee-plaintiff Yost was negligent or not does not calculate into or absolve factual and legal negligence of appellant-defendant Smith. Furthermore, the "turn signal" issue may have been a question of fact, but certainly the "failure to look effectively" issue was uncontradicted and should have been decided, and was decided, by the court as a matter of law.

Applying the statutory mandates and principles enunciated in Adkins, it is clear in the case at bar that the appellant-defendant Smith was negligent as a matter of law and the trial court did not abuse its discretion in granting a new trial on that ground. Accordingly, this Court should uphold the trial court's decision and deny the instant appeal.

RELIEF PRAYED FOR

Based upon the foregoing, the Circuit Court of Brooke County did not err by granting the appellee-plaintiff's Motion for a New Trial and finding that the appellant-defendant was negligent as a matter of law. The appellee, therefore, respectfully requests that this Court affirm and sustain the judgment of the Circuit Court as reflected in its November 5, 2007 Order.

Wesley Cross, plaintiff-appellee



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v.

MARK E. SMITH,

Appellant/Defendant below.

CERTIFICATE OF SERVICE

I, Frank Cuomo Esq., counsel for Appellee/ plaintiff, do hereby certify that I have on this the July 14, 2008, mailed this original and nine copies of the BRIEF ON BEHALF OF APPELLEE-PLAINTIFF Wesley Cross to the Clerk of the West Virginia Supreme Court of Appeals and have served a true and exact copy of the foregoing upon all counsel of record herein by Facsimile transmission addressed as follows:

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